INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Argument	4
Conclusion	12
Appendix	13

CITATIONS

Cases:

Aetna Casualty & Surety Co. v. *Commercial State Bank of Rantoul*, 13 F. 2d 474, reversed 19 F. 2d 969	6, 11
American Stevedores v. *Porello*, 330 U. S. 446	5
Leonard v. *Aetna Casualty & Surety Co.*, 80 F. 2d 205	7
Maryland Casualty Co. v. *First Nat. Bank of Montgomery, Ala.*, 246 Fed. 892, certiorari denied, 246 U. S. 670	8, 11
Standard Accident Ins. Co. v. *Collingdale State Bank*, 85 F. 2d 375	7, 11

Statutes:

Act of March 8, 1928, 45 Stat. 247	9
6 U.S.C. 3	7, 9, 13
6 U.S.C. 14	3
6 U.S.C. 15	10, 14
39 U.S.C. 815	7, 16

Miscellaneous:

Commission on Organization of the Executive Branch of the Government, The, *Report on the Treasury Department, March 1949 (Recommendation No. 10, p. 21)*	5, 8
4 Comp. Dec. 411	10
5 Comp. Dec. 918	10
69 Cong. Rec. 3936	10
26 Op. A.G. 70	7, 10
H.R. 4002, 81st Cong. 1st sess.	4
H.R. 4642, 81st Cong. 1st sess.	4
H. Rep. 383, 70th Cong. 1st sess.	10
S. 1692, 81st Cong. 1st sess.	4
Treasury Department Circular No. 745, issued July 10, 1944, revised March 18, 1946	5

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 750

AMERICAN SURETY COMPANY OF NEW YORK,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the United States District Court for the District of Connecticut (R. 12-21, 26) are reported at 77 F. Supp. 318. The opinion of the Court of Appeals for the Second Circuit (R. 34-43) is reported at 172 F. 2d 135.

JURISDICTION

The judgment of the Court of Appeals was entered January 25, 1949 (R. 44-45). The petition for a writ of certiorari was filed on April 25, 1949. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Where a postal employee's surety bond provides a penal sum of $2000, a "total premium" of $1.30, an indefinite term, and does not limit aggregate liability, and the employee continues to pay annual premiums of like amount, may the United States, as obligee of the bond, recover cumulative penalties of $2000 for each year the bond is in force, or is the surety's liability limited to $2000 for all breaches occurring during the entire time the bond was effective even though that sum was exhausted by early defalcations not discovered for many years.

STATUTES INVOLVED

The pertinent provisions of the applicable statutes are set out in the Appendix, *infra,* pp. 13-17.

STATEMENT

This action was brought by the United States, as obligee, to recover from a surety company upon a bond securing the faithful performance of his duties by one Welge, a postal employee. The case was tried on a stipulation of facts (R. 7-9).

On October 26, 1935, Welge, as principal, and petitioner, as surety, executed a bond on Government Form 1117 in the penal sum of $2,000. Its condition was "that if the said employee shall, on and after October 26, 1935, faithfully discharge all the duties and trusts imposed on him as such

heretofore designated employee * * * then this obligation shall be void; otherwise, of force" (R. 10). The bond also stated that "the premium of this bond is $0.65 per $1,000" and the "total premium charged $1.30" (R. 10).[1] Annually thereafter until 1944, Welge paid a like amount for the renewal of the bond. It was then discovered that, beginning in 1935, he had been guilty of a series of embezzlements amounting to $7,949.72. In any one year, however, the defalcations never exceeded $2,000. Restitution being made by Welge in the sum of $4,083.75, the United States made demand of petitioner in the remaining amount of $3,865.97. Petitioner tendered $2,000, the penal sum of the original bond, which was refused (R. 8-9); this suit followed. The District Court for the District of Connecticut concluded that "on the payment of each additional premium, the parties entered into a contract similar to terms to the original bond, guaranteeing the United States in the amount of $2,000 against embezzlement by the employee from the date of payment of the additional premium," that "liability on the bond is cumulative on the original and each renewal," and that "plaintiff is entitled to recover on the bond the amount of $3,865.97, and interest, together with its costs" (R. 21). The Court of Appeals, one judge dissent-

[1] It also contained the statement that "the amount of premium charged for a like bond during the year 1908 was $2.00 per $1,000." This information was given because of a statutory prohibition of a charge more than 35 per cent in excess of the 1908 rate. 6 U.S.C. 14.

ing, affirmed the judgment of the District Court, rejecting petitioner's contentions that liability was continuous rather than cumulative, and was limited to a maximum of $2,000. "It does not seem rational to believe that the United States would require a contract from a surety of so little practical value or that a company in business as a paid surety would be justified in contemplating that it had promised so little" (R. 41).

ARGUMENT

Petitioner has executed, and the United States has accepted, a surety bond for the faithful discharge of a postal clerk's duties which contains no explicit language defining the aggregate liability of petitioner, as surety. The question presented for decision is whether the parties intended to provide for successive annual liabilities of $2,000 or for a continuous liability limited to $2,000. That question—basically a matter of specific contractual intent—is one of limited applicability which may never be raised again in this form, and in any case will probably arise only infrequently in the future. As to future fidelity bonds, the intention of the parties on this point can, and presumably will, be made clearer.[2] And as to fidelity bonds al-

[2] The attention of the Court is called to the possibility that the existing system of fidelity bonds may be entirely supplanted by a Governmental fidelity trust fund. H.R. 4002, 81st Cong., 1st sess., provides for the establishment and maintenance of a fidelity trust fund in the Post Office Department, in lieu of requiring employees to furnish fidelity bonds. S. 1692 and H.R. 4642, 81st Cong., 1st sess., would amend

ready executed, it seems unlikely that any substantial number of controversies will actually result from this particular problem (see *infra*, pp. 8-9); moreover, the barrenness of the record made below, which contains little evidence of intent other than the bond itself, makes it questionable that a finding by this Court on the question of the parties' intent would necessarily be applicable in future litigation where a fuller record is made.[3] In view of these considerations, and of the correctness of the Court of Appeals' decision on the present record, we submit that further review is not warranted.

1. Nothing on the face of the bond supports petitioner's contention that the successive annual premiums were merely installment payments on an entire insurance contract, restricted to a recovery of no more than $2,000 over an indefinite period. Reliance is placed on the wording of the condition "if the said employee shall, on and after October

---

Sections 1-5, inclusive, of title 6 of the United States Code, and establish a Federal fidelity trust fund covering all employees of the Government. See also The Commission on Organization of the Executive Branch of the Government, *Report on the Treasury Department, March 1949*, Recommendation No. 10, p. 21.

[3] Cf. *American Stevedores* v. *Porello*, 330 U.S. 446, 457. Neither the postal employee's application for the surety bond nor the annual premium receipts were introduced in evidence. These documents may afford a material insight to the parties' intention, particularly in the case of the receipts which are frequently required, by government administrative practice, to be furnished by the accountable employee to the proper government official for approval, to insure that proper coverage is obtained. See, *e. g.*, Treasury Department Circular No. 745, as issued on July 10, 1944 (see Circular No. 745, as revised March 18, 1946, reprinted in the *amicus curiae* brief, p. 34).

26, 1935, faithfully discharge all the duties and trusts imposed on him," but such language is not inconsistent with an intention to provide for successive annual penalties. The premium charged is the "total" premium "of this bond," thus tending to indicate that the annual renewals constituted separate agreements. This ambiguity is not relieved by other terms of the bond; there is no express provision made for termination of the bond, for renewals, or for annual or other periodic premium payments.

Absent compelling external indicia of intent or more precise language, we believe that the practical considerations found persuasive by the district court (R. 26) and the court below (R. 41) offer a proper guide to a determination of the surety coverage which the Government obtained. Under petitioner's theory, if there were a loss of $2,000 the first year, not discovered for several years, then, though equal annual premiums are successively paid, the United States would have no protection for those later years because the penalty of the bond was completely exhausted by the first year's losses and nothing remained to cover subsequent losses. As the court said in *Aetna Casualty & Surety Co.* v. *Commercial State Bank of Rantoul,* 13 F. 2d 474, 476 (E.D. Ill.), reversed on other grounds, 19 F. 2d 969 (C.A. 7)—a comparable case of successive annual payments—"what did he [the obligee] buy the second year?" "We are the more persuaded to this view by the improbability that a practical bus-

iness concern * * * would pay one company two premiums for a single right of recovery if it could by payment of the same sum to two separate insurance carriers procure recoverable insurance for two periods." *Standard Accident Ins. Co.* v. *Collingdale State Bank,* 85 F. 2d 375, 376 (C.A. 3).[4] Since the renewal premiums were equal in amount to the initial premium, the most reasonable interpretation is that they should provide equal coverage without diminishing the coverage for undiscovered defalcations in the previous period.[5]

---

[4] While the United States did not pay the premiums in the instant case, it was of course the obligee of the bonds and conformably with statutes was in a position to direct the principal, its employee, to place the bond in any manner it saw fit. Accordingly, the contention of petitioner (Pet. p. 16) that the payment of premiums was a matter of concern only to the principal and surety and was of no moment to the obligee is neither persuasive nor accurate.

[5] By statute, the liability of a surety on an official bond continues and covers "the period of service ensuing until the appointment and qualification of the successor of the principal." 6 U.S.C. 3 (*infra*, pp. 13-14); 26 Op. A.G. 70. A new bond may be substituted under the procedure stated in 39 U.S.C. 815 (*infra*, pp. 16-17), but when the substitution is accomplished, the sureties in the prior bond are released from responsibility only for defaults of the principal committed "subsequent to the day such new bond becomes operative." Thus, liability for a defalcation of the principal occurring in any one year would continue whether or not a renewal premium is paid for a later year. Hence, renewal payments must constitute successive new agreements to the extent of $2,000 each or serve no purpose.

It is suggested as an opposing practical consideration that the continuous form of bond obviates the necessity of proving the particular period in which the defalcations took place. *Leonard* v. *Aetna Casualty & Surety Co.*, 80 F. 2d 205, 207 (C.A. 4). But, as the court below says, "How important a practical consideration this may be is not clear; one suspects it is more bookish than real in cases of substantial and proven embezzlements of postal clerks. But in any event, such a

Cf. *Maryland Casualty Co.* v. *First Nat. Bank of Montgomery, Ala.*, 246 Fed. 892, 900 (C.A. 5), certiorari denied, 246 U. S. 670. Unquestionably, public policy dictates that the Government be protected as fully as possible from the misfeasance of its officials and employees. We submit that an intent to acquire less than complete protection for the Government, by payment of exactly the same sums for which complete protection might easily be had, cannot properly be imputed either to the Post Office Department which prescribed the form, the Government officials who accepted the bond, or the employee for whom petitioner is surety.

Nor is there any merit to the contention suggested by Judge Swan in his dissent below, that "it seems highly improbable that the surety would voluntarily incur a maximum liability of $20,000 for $13 (assuming the employee's term of service should continue for ten years)." (R. 43). That suggestion is completely rebutted by the fact that assessable recoveries from sureties have averaged only about $230,000 annually (the recent war period included) although the aggregate annual premium cost to the Government's accountable officers and employees was about $2,000,000. See The Commission on Organization of the Executive Branch of the Government, *Report on the Treasury Department, March 1949*, p. 21. Because of this very disproportion of costs and recoveries, that Com-

---

detail of proof can hardly offset the very real need of a right to collect the amount of the bond for each of the years in which a defalcation occurs." (R. 39).

mission has recommended that the Government establish its own fidelity trust fund. See Note 2, *supra*.[6]

2. Petitioner urges that the legislative development of 6 U.S.C. 3 (*infra*, pp. 13-14) demonstrates that continuing but limited, rather than cumulative, liability was intended. In its original form, the statute required that bonds be renewed every four years.[7] In 1928 it was amended to provide that "the payment and acceptance of the annual premium on corporate surety bonds furnished by postal officers and employees shall be a compliance with the requirement for the renewal of such bonds" within the statutory meaning. 45 Stat. 247. Petitioner asserts that Congress, in making this change, certainly considered the existing bonds to be of continuing liability (Pet. p. 20).

---

[6] Petitioner contends that these periodic payments were merely annual installments which had no more legal significance than if the premium had been paid in monthly or semi-monthly installments. (Pet. pp. 16-17). The argument is without merit, and overlooks the fact that the bond does not provide for a premium payable in annual installments but, in express terms, states that the "total premium" charged is $1.30. Petitioner's argument necessarily supposes that the risk of embezzlement is calculated for an indefinite term of employment, then divided to obtain periodic premium installments which are equal for each employee, although terms of employment may be of different duration. On the contrary, we think it most probable that the premium charged was based on a risk calculated for the period of a year.

[7] The renewals were termed "new" bonds. "Every officer whose duty it is to take and approve official bonds shall cause all such bonds to be renewed every four years after their dates, but he may require such bonds to be renewed or strengthened oftener if he deem such action necessary. In the discretion of such officer the requirement of a *new* bond may be waived * * *." [emphasis supplied] 6 U.S.C. 3.

We cannot agree. The prior quadrennial renewals secured cumulative coverage to the Government. See 4 Comp. Dec. 411, 415; 5 Comp. Dec. 918, 922; 26 Op. A.G. 70. The amendment of 1928 was adopted at the instance of the Post Office Department because this procedure was uneconomical and unnecessary for bonds written by Treasury-supervised companies.[8] The court below properly points out that it is too much to say that the provision for annual premiums, adopted simply for administrative convenience, was intended to limit drastically the cumulative coverage which the Government then enjoyed by reason of the previous quadrennial renewals of all bonds (R. 38).

Petitioner notes, however, that Government employees, in lieu of filing a fidelity bond, may deposit Government securities "in a sum equal at their par value to the amount of such penal bond required to be furnished." 6 U.S.C. 15. A cumulating deposit of securities would presumably not be required, petitioner contends, and if the alternative provisions are to be reconciled, the provision for a surety bond cannot be construed to impose cumulative liability. Post Office Department files reveal that no deposits of securities have ever been made, and hence there is no administrative practice which would indicate the proper interpretation of the deposit provision. We think it significant however, as did the court below (R. 38-39), that "the de-

[8] See H. Rep. 383, 70th Cong. 1st sess.; 69 Cong. Rec. 3936.

posit provision exists side by side in the statutes with the original quadrennial renewal provision * * * it seems particularly unlikely that Congress would have meant not to protect the Government by annual premiums paid to the same insurer, when protection could have been obtained merely by application to another surety * * * Whatever may turn out to be the proper interpretation of the deposit provision, we think it cannot be held to limit the force of the requirement for an annual additional premium."

3. As Judge Clark indicates (R. 39-40), the cases involving private litigants and bonds of comparable, but not exactly similar, wording afford only an incomplete analogy.[9] Those bonds which contain language clearly negativing cumulative liability are plainly not in point. Where the language of the bond is more general, the better considered cases find cumulative liability by reason of the practical considerations set out above (*supra*, pp. 6-7), and which we agree with the Court of Appeals are likewise decisive here. See *Maryland Casualty Co.* v. *First Nat. Bank of Montgomery, Ala.*, 246 Fed. 892, 900 (C.A. 5), certiorari denied, 246 U.S. 670; *Aetna Casulty & Surety Co.* v. *Commercial State Bank of Rantoul*, 13 F. 2d 474, 476 (E.D. Ill.), reversed on other grounds, 19 F. 2d 969 (C.A. 7); *Standard Accident Ins. Co.* v. *Collingdale State Bank*, 85 F. 2d 375, 376 (C.A. 3).

[9] No cases in point involving federal surety bonds have been found.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
H. G. MORISON,
Assistant Attorney General.
PAUL A. SWEENEY,
BENJAMIN FORMAN,
HADLEY W. LIBBEY,
Attorneys.

JUNE 1949.

APPENDIX

The following statutory provisions are involved herein:

6 U. S. C. 3:

Every officer whose duty it is to take and approve official bonds shall cause all such bonds to be renewed every four years after their dates, but he may require such bonds to be renewed or strengthened oftener if he deem such action necessary. In the discretion of such officer the requirement of a new bond may be waived for the period of service of a bonded officer after the expiration of a four-year term of service pending the appointment and qualification of his successor. The non-performance of any requirement of the provisions of sections 1 to 3 of this title, or of that part of section 27 of title 19 relating to transmitting copies of oaths to the Secretary of the Treasury, on the part of any official of the Government shall not be held to affect in any respect the liability of principal or sureties on any bond made or to be made to the United States. The liability of the principal and sureties on all official bonds shall continue and cover the period of service ensuing until the appointment and qualification of the successor of the principal. Nothing in said sections shall be construed to repeal or modify section 38 of title 39: *Provided,* That the payment and acceptance of the annual premium on corporate surety bonds furnished by postal officers and employees, officers and employees of other civilian agencies of the United States and bonded

officers and enlisted men of the Army, Navy, Marine Corps, and Coast Guard shall be a compliance with the requirement for the renewal of such bonds within the meaning of sections 1 to 3 of this title. (July 30, 1947, c. 390, § 1, 61 Stat. 646).

6 U. S. C. 15:

Wherever by the laws of the United States or regulations made pursuant thereto, any person is required to furnish any recognizance, stipulation, bond, guaranty, or undertaking, hereinafter called "penal bond", with surety or sureties, such person may, in lieu of such surety or sureties, deposit as security with the official having authority to approve such penal bond, United States Liberty bonds or other bonds or notes of the United States in a sum equal at their par value to the amount of such penal bond required to be furnished, together with an agreement authorizing such official to collect or sell such bonds or notes so deposited in case of any default in the performance of any of the conditions or stipulations of such penal bond. The acceptance of such United States bonds or notes in lieu of surety or sureties required by law shall have the same force and effect as individual or corporate sureties, or certified checks, bank drafts, post-office money orders, or cash, for the penalty or amount of such penal bond. The bonds or notes deposited hereunder, and such other United States bonds or notes as may be substituted therefor from time to time as such security, may be deposited with the Treasurer

of the United States, a Federal Reserve bank, or other depositary duly designated for that purpose by the Secretary, which shall issue receipt therefor, describing such bonds or notes so deposited. As soon as security for the performance of such penal bond is no longer necessary, such bonds or notes so deposited shall be returned to the depositor. In case a person or persons supplying a contractor with labor or material as provided by sections 270a to 270d of title 40 shall file with the obligee, at any time after a default in the performance of any contract subject to said sections 270a to 270d, the application and affidavit therein provided, the obligee shall not deliver to the obligor the deposited bonds or notes nor any surplus proceeds thereof until the expiration of the time limited by said sections 270a to 270d for the institution of suit by such person or persons, and, in case suit shall be instituted within such time, shall hold said bonds or notes or proceeds subject to the order of the court having jurisdiction thereof. Nothing herein contained shall affect or impair the priority of the claim of the United States against the bonds or notes deposited or any right or remedy granted by said sections 270a to 270d or by this section to the United States for default upon any obligation of said penal bond. All laws inconsistent with this section are hereby so modified as to conform to the provisions hereof. Nothing contained herein shall affect the authority of courts over the security, where such bonds are taken as security in judicial proceedings, or the authority of any adminis-

trative officer of the United States to receive United States bonds for security in cases authorized by existing laws. The Secretary may prescribe rules and regulations necessary and proper for carrying this section into effect. The term "person" in this section means an individual, a trust or estate, a partnership, or a corporation; the term "Secretary" means the Secretary of the Treasury. In order to avoid the frequent substitution of securities such rules and regulations may limit the effect of this section, in appropriate classes of cases, to bonds and notes of the United States maturing more than a year after the date of deposit of such bonds as security. The phrase "bonds or notes of the United States" shall be deemed, for the purposes of this section, to mean any public-debt obligations of the United States and any bonds, notes, or other obligations which are unconditionally guaranteed as to both interest and principal by the United States. (July 30, 1947, c. 390, § 1, 61 Stat. 646).

39 U. S. C. 815.

Whenever any postmaster, clerk, carrier, or other person in the Postal Service, employed in the Post Office Department or elsewhere, notifies the Postmaster General of his desire to execute a new bond, or whenever any of the sureties of such postmaster, clerk, carrier, or other person, notifies the Postmaster General of his desire to be released from such suretyship, or whenever the Postmaster General deems a new bond necessary or expedient, the execution of the new bond may be directed

by the Postmaster General. When accepted by the Postmaster General the sureties of postmasters in the prior bond shall be released from responsibility for all acts or defaults of the postmaster which may be done or committed subsequent to the last day of the quarter in which such new bond shall be executed and accepted, and the sureties of other persons in the prior bond shall be released from responsibility for all acts or defaults of such persons which may be done or committed subsequent to the day such new bond becomes operative. (Mar. 3, 1905, c. 1488, 33 Stat. 1259).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1949 838888 844